SIXTH CIRCUIT REVIEW

Disability Diagnosis and Abortion: An Undue Burden? The State of Ohio Requests an En Banc Rehearing

MEAGAN DIMOND

The Sixth Circuit has again been pulled into a fight over an Ohio law that prohibits medical providers from performing abortions if they know that the patient is seeking an abortion because of a Down Syndrome diagnosis. The Court has already ruled on the case, but a petition for en banc review has brought it back. The arguments in the case center on whether the right to choose to abort a pregnancy is absolute pre-viability or whether pre-viability abortion restrictions are subject to an undue burden analysis.

In 2017, Ohio passed a bill to enact OHIO REV. CODE § 2919.10, which prohibits medical providers from intentionally performing or inducing an abortion if they have "knowledge that the pregnant woman is seeking the abortion, in whole or in part, because of" Down Syndrome. To verify compliance with the law, physicians are required to attest in writing that they were not aware that fetal Down Syndrome was a reason for the person's decision to terminate.

The law was scheduled to go into effect on March 23, 2018, but a group of abortion providers (non-profit organizations, physicians, and medical facilities) filed a preliminary injunction in federal court asking to block its enforcement and get a declaratory judgment that the law is facially unconstitutional. The United States District Court for the Southern District of Ohio granted the motion, holding that a person is categorically entitled to choose whether to terminate a pre-viability pregnancy regardless of the state's proclaimed interest. *Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746, 750 (S.D. Ohio 2018). The State of Ohio appealed.

In its appeal to the Sixth Circuit, the State argued that the district court erred in creating a categorical right to a pre-viability abortion that precludes any limitations based upon the reasons for the abortion. They argued that the state interest in preventing discrimination based on disability does not fall under the rationale of either *Roe v. Wade*, 410 U.S. 113 (1973), or *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Rather, they argued that the lower court should have evaluated the law under a strict scrutiny analysis to determine whether the state's interest

in preventing discrimination outweighs a person's right to privacy. The Sixth Circuit disagreed. *Preterm-Cleveland v. Himes*, 940 F.3d 318, 324 (6th Cir. 2019).

The 2-1 Sixth Circuit majority opinion echoed the lower court analysis, holding that the state's purported interests are irrelevant to pre-viability pregnancies, which enjoy categorical constitutional protection under *Roe* and *Casey*. In *Roe*, The United States Supreme Court held that a person's decision to obtain an abortion is a fundamental right, though that right is qualified and must be balanced against the state interests in regulation. *Roe*, 410 U.S. at 154. The Court held that the state interest in the health of the mother becomes sufficiently compelling at the end of the first trimester and interest in potential life at the point of viability. *Id.* at 163–64. Twenty years later, in *Casey*, the Supreme Court upheld *Roe* and refined the rule, explaining that:

> [b]efore viability, the State's interests are not strong enough to support a prohibition of abortion . . . *Regardless of whether exceptions are made for particular circumstances*, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

Casey, 505 U.S. at 879 (emphasis added).

Following this precedent, The Sixth Circuit held that the state's purported interest in preventing discrimination is "inescapably intertwined" with the state's interest in potential life in *Roe* and *Casey*, and thus cannot be compelling until viability. *Himes*, 940 F.3d at 324.

However, Judge Batchelder's dissent argues that pre-viability abortions are subject to restrictions under the Supreme Court precedent set in *Gonzales v. Carhart*, 550 U.S. 124 (2007). *Gonzales*, she argues, requires the court to review laws like the one at issue here—laws that do not constitute a *total* ban on abortion—using an undue-burden analysis. *Himes*, 940 F.3d at 326 (Batchelder, J. dissenting). That test, as outlined in *Carhart*, 550 U.S. 124, and further refined in *Whole Women's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016), requires a court to determine that a law that burdens the right to abortion furthers a valid state interest, confers benefits that outweigh the imposed burdens, and is based on credible evidence. *Himes*, 940 F.3d at 326 (Batchelder, J. dissenting).

The district court in this case disagreed with dissent's characterization, finding that the Ohio law "eradicates the right [to choose

a pre-viability abortion] entirely." *Himes*, 294 F. Supp. 3d at 754–55. Judge Batchelder counters by claiming that the burden placed on women seeking a pre-viability abortion is not, in fact, insurmountable. *Himes*, 940 F.3d at 327–28. Although the statute bans abortions done for a specific reason, a violation occurs only when a physician *knows* that a woman's reason for the abortion is a Down Syndrome diagnosis. Therefore, it is possible for a physician to simply refer the patient to another physician should that reason become known. The dissent argues that this may be enough to find that the law does not impose an undue burden. *Id.*

In December, the Sixth Circuit granted the State of Ohio's petition for an en banc rehearing. The rehearing will take place before all of the judges on the court, rather than just a three-judge panel. In its appeal, the state framed the statute as an "Antidiscrimination Law" and called into question the Sixth Circuit's conclusion that the right to a pre-viability abortion is "categorical." Appellants' Pet. for Reh'g and Reh'g En Banc, *Preterm Cleveland v. Acton*, No. 18-3329 at 1–2 (6th Cir. Oct. 25, 2019). They argued that the real reason for en banc review is "the 'exceptional importance' of the question whether States can pass anti-eugenics laws." *Id.* at 2.

En banc review is rare, with the Sixth Circuit granting only around 1 percent of petitions. However, abortion is a hot-button topic nationally, with several pending cases challenging the limits of *Roe* and its progeny. Thus, the oral arguments in the en banc re-hearing, scheduled for March 10, 2020, will likely center on the application of the undue burden test and whether the abortion ban based upon disability diagnosis is, indeed, an insurmountable burden.

Regardless of the Sixth Circuit's en banc decision, the losing side will likely petition the Supreme Court for certiorari. Legal scholars have speculated that this may be a conservative Supreme Court ready to reconsider *Roe* and *Casey* should the right case arise. Doing so has the potential to affect the direction of abortion jurisprudence moving forward.